Supreme Court, U.S.
FILED
APR 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 76-1463

APRIL INDUSTRIES, INC.,
Petitioner,

vs.

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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Salt Lake City, Utah 84111

ATTORNEYS FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

_____

APRIL INDUSTRIES, INC.,
Petitioner,

vs.

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Respondents.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

_____

Petitioner, April Industries, Inc., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Utah entered in the above-entitled case on January 24, 1977.

OPINIONS BELOW

The District Court of the Third Judicial District in and for Salt Lake County filed no opinion, but its original findings of fact, conclusions of law and judgment are set out in Appendix A hereto. The opinion of the Utah Supreme Court of March 12, 1976, is reported at 547 P.2d 219 (Utah 1976) and is further set out in Appendix B hereto.

On April 12, 1976, the Utah Supreme Court denied petitioner's petition for rehearing in the case. The Utah

Supreme Court entered no opinion in denying said petition. A copy of its order is attached as Appendix C.

The second judgment of the District Court of Salt Lake County of May 18, 1976, was not reported. A copy of this judgment is appended hereto as Appendix D.

The opinion of the Utah Supreme Court of January 24, 1977, is reported at _____ P.2d _____ (Utah 1977). This opinion is set out as Appendix E.

JURISDICTION

The judgment of the Utah Supreme Court was entered on January 24, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the award of inconsistent remedies by a state court, which award unjustly enriches one party and effectively confiscates the property of another, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the state court rulings in question were inconsistent with and in violation of the standard of judicial fairness mandated by the Due Process Clause.

3. Whether the rulings of the Utah Supreme Court were so erroneous that they approach the constitutionally impermissible standard of arbitrary action.

STATUTES INVOLVED

This petition presents no questions involving any applicable statutes.

STATEMENT OF THE CASE

After the trial of this case in March of 1975 the Utah trial court ordered petitioner to issue to respondents new stock certificates without restrictive legends. The trial

court refused, however, to award to respondents any damages. From this ruling the respondents appealed to the Utah Supreme Court. In March of 1976 the Utah Supreme Court ruled that respondents were also entitled to damages. On remand, the trial court entered judgment both requiring petitioner to issue the new certificates without restrictive legend and also awarding to respondents an aggregate amount of damages and accrued interest in the sum of $55,239.28. On January 24, 1977, the Utah Supreme Court affirmed this judgment.

In September of 1969, the respondents, as members of the Board of Directors of Alta-Helena Mining and Milling Company, voted to give themselves 16,000 common shares of the company's stock.[1] This stock was issued in compensation for past services which respondents had rendered to the company. The issued certificates were stamped with a restrictive legend stating that the shares could not be freely sold or transferred. At the same time the shares were issued, plaintiffs also entered into an agreement obligating the company to include the issued shares in any future public offering of the company's common stock. This inclusion was to be at no expense to the respondents.

In February of 1972, petitioner did in fact have a public offering of its stock at a price of $13.00 per share. None of the shares issued to respondents in September of 1969 was included for sale in this offering.

In May of 1974 respondents filed the present action in the District Court of the Third Judicial District in and for Salt Lake County seeking damages and other relief

---

1 Petitioner, April Industries, Inc., is the successor through merger to Alta-Helena Mining and Milling Company. As part of the merger transactions, April Industries, Inc.'s common shares were recapitalized so that each one of the present April Industries' shares represents four old shares of Alta-helena. Thus the original 16,000 shares now represent 4,000 of the company's stock.

because of petitioner's failure to include the shares in the 1972 public offering.

REASONS FOR GRANTING THE WRIT

Petitioner would respectfully submit that this is an appropriate case for this Court to exercise its constitutional power to review common law rulings of state courts which in effect deprive parties, such as petitioner, of their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner submits that this is so for two reasons:

(1) The rulings of the Utah Supreme Court ignored the arguments, claims and rights of petitioner.

(2) If ever this Court is to review cases concerning the constitutional propriety of common law rulings of state courts, the present case is, both on the law and on its facts, a particularly appropriate vehicle for doing so.

1. The rulings of the Utah Supreme Court violate the constitutional standard of due process of law.

The rule applicable to this case was stated by Mr. Justice Holmes in *Chicago Life Insurance Company v. Cherry*, 244 U.S. 25, 61 L.Ed. 966, 37 S.Ct. 492 (1917):

> "Whenever a wrong judgment is entered against the defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights." (244 U.S. at 30) (Emphasis added)

It is submitted that the rulings of the Utah Supreme Court in the instant case are of the kind impossible in any rationally administered system of justice. This is so for two reasons.

First, there is the effect of the rulings themselves.

Respondents have been awarded inconsistent remedies. They are to receive an amount in damages virtually equivalent to what they would have received had they sold their shares in the 1972 public offering of the company's stock. Yet the plaintiffs are also being awarded new certificates of stock without restrictive legend. Thus they are being permitted to have the benefit of having sold their shares and at the same time they are being told they can keep those shares. This is an unjust result not approved of by common law jurisdictions which have considered the issue. See *Thornburg v. Homestead Minerals Corporation*, 513 P.2d 219 (Colo. App. 1973); *Owen v. Merts*, 240 Ark. 1080, 405 S.W.2d 273 (1966); *Virginia Public Service Company v. Steindler*, 166 Va. 686, 187 S.E. 353 (1936).

Secondly, the opinions of the Utah Supreme Court payed scant attention to petitioner's claims and arguments that inconsistent remedies were being invaded. Petitioner presented these arguments to that court on two distinct occasions. After the March 12, 1976 opinion (Appendix B) petitioner filed a petition for rehearing asserting, among other things, the improprity of the award made to respondents. The Utah Supreme Court summarily denied this petition without opinion (Appendix C).

Petitioner renewed its arguments on a second appeal. The opinion of January 24, 1977 (Appendix E) did not respond to these arguments with anything more than the ipse dixit that "defendant cites cases in support of its claim, but those cases are not factually the same as the instant matter." Thus, the case presents the unhappy combination of an unjust result reached after improper consideration of petitioner's arguments.

2. The ruling of the Utah Supreme Court in effect amounts to an arbitrary confiscation of petitioner's property.

The damage award granted to respondents virtually compels petitioner to pay the equivalent of the purchase price of the respondents' stock. Yet at the same time defendant is being told that it must issue to respondents new stock certificates for those shares. In effect, the rulings of the Utah Supreme Court force petitioner to purchase property which those rulings do not permit it to own.

For these reasons the decisions of the Utah Supreme Court violate the standards of constitutional propriety set forth by Mr. Justice Cardozo in *Roberts v. New York*, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689 (1935), where he stated, in replying to an argument that property had been taken in a condemnation proceeding without due process of law, as follows:

> "In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guarantee that a trial should be devoid of error . . . To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." (295 U.S. at 277) (Citations omitted) (Cf. *West Ohio Gas Company v. Public Utilities Commission*, 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761 (1935)).

Petitioner would submit that the rulings of the Utah Supreme Court cross that "boundary of arbitrary action" condemned in *Roberts*.

CONCLUSION

Petitioner would respectfully submit that this Court should grant certiorari as an exercise of its constitutional mandate to prevent improper state action which infringes upon property rights. Such property interests are valuable and worthy of constitutional protection. As stated by Mr. Justice Stewart in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 92 S.Ct. 1113,

31 L.Ed2d 424 (1972);

> "'The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." (405 U.S. at 543) (Citations omitted).

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Plaintiffs,

vs.

APRIL INDUSTRIES, INC., a Delaware corporation,
Defendant.

AMENDED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 219872

This cause having come on for trial on March 26, 1975 and having continued until March 28, 1975; plaintiffs appearing in person and through their counsel John W. Lowe and defendant appearing through its counsel Kenneth W. Yeates and the parties having adduced evidence and the Court having considered the same, now makes its

FINDINGS OF FACT

1. Defendant's predecessor, April Industries, Inc., a Utah corporation, was organized in October, 1916 under the name Alta Helena Mining and Milling Company and has been engaged since its organization in business operations in the State of Utah. In 1969 it changed its

name to April Industries, Inc. In April, 1971, April Industries, Inc., a Delaware corporation, was organized by April Industries, Inc., a Utah corporation, as a wholly owned subsidiary and thereafter April Industries, Inc., a Utah corporation, was merged into the Delaware corporation, the resulting entity being the defendant.

2. Pursuant to the merger, there was a reverse split of stock whereby each four shares of April Industries, Inc., a Utah corporation, common stock became one share of defendant's common stock.

3. On September 30, 1969, Alta Helena Mining and Milling Company issued 4,000 shares of restricted stock to each of the plaintiffs for services rendered as directors and agreed that if it filed a registration statement in the future for the offering of shares other than those represented by the certificates so issued, it would include these shares in such registration statement. This issuance of stock and the agreement to register were made and entered into in the State of Utah. Said agreement to register plaintiff's shares was bargained for by plaintiffs, agreed to by defendant and is a valid and legally enforceable agreement given for adequate consideration and in compliance with the laws of the State of Utah.

4. Said issuance of shares and the agreement to register were approved and authorized by all of the directors. The shares and agreement to register were given as compensation to the directors for services rendered. They did not involve the payment of a debt otherwise to be owing by the directors and did not involve the payment of personal debts by the corporate entity. The consideration given by the directors for said shares and agreement to register was supported by consideration and the consideration was adequate, and commensurate with the services performed. The compensation was not excessive.

5. The issuance of shares and the agreement to

register were authorized and approved by all of the directors and therefore by a quorum thereof.

6. The directors properly notified the shareholders of the corporate entity, both by reflecting same in the minutes of the meeting of the board of directors, which minutes were ratified by the stockholders and by a written report to shareholders reflecting same.

7. There was no misrepresentation on the part of any of the directors.

8. Subsequently, plaintiffs Harold O. Bjork and Beatrice A. Wilcox caused their Alta Helena Mining and Milling company shares to be reissued as an equivalent number of shares of April Industries, Inc., bearing a restrictive legend.

9. The shares issued to plaintiffs for services as directors were validly issued for services rendered to the corporation.

10. Plaintiffs are the owners and holders of said shares or shares issued in replacement thereof by the defendant.

11. On or about February 4, 1972, defendant filed a registration statement for the issuance of 325,000 shares of its common stock, and failed to include plaintiffs' shares in said registration.

12. Plaintiffs failed to make a demand upon defendant to perform until such time as this suit was filed on May 29, 1974.

13. Plaintiffs were aware or should have been aware of the scope and affect of their agreement with defendant.

14. Defendant circulated a prospectus some five months prior to the filing of the registration statement and no provision was contained therein for the registration of plaintiffs shares and they were in fact not included in the registration statement of February 4, 1972. Plaintiffs made no inquiry or protest.

15. The market value of April shares was constantly changing all during the time pertinent to these

proceedings yet plaintiffs did not consult any knowledgeable person seeking advice as to how the shares might be rendered marketable nor did they seek legal advice about the marketability of the shares or their legal rights, under the agreement bargained for to register the shares.

16. That plaintiff Herman Bjork contacted the Securities Exchange Commission office in November of 1971 in an effort to obtain marketable shares and thereafter wrote a letter to Alex Parker. Receiving no result he in his words, "let the matter slide".

17. That plaintiff Harold Bjork made no effort at all to sell his own shares "because of the experience of his brother, Herman".

18. That plaintiff Arthur Anderson never caused his shares of Alta Helena stock to be re-issued and his only effort to sell was in June of 1972 when he was told by a broker the shares were restricted and not marketable.

19. That plaintiff Beatrice Wilcox solicited the assistance of a broker to sell her shares in the "summer of 1972" but no sale was made since they were restrictive shares. Her broker attempted to contact the "people in New York" but was only able to reach Alex Parker who advised stock would become valuable and "to hang on to it."

From the foregoing Findings of Fact the court makes and enters the following:

CONCLUSIONS OF LAW

1. That plaintiffs are the owners of the shares of stock here in question and that the same were validly issued for services rendered the corporation.

2. That plaintiffs bargained for and obtained a legally enforceable agreement to have said shares of stock registered and that defendant failed to so register the shares, however, plaintiffs failed also to make a demand upon defendant to perform until such time as

this suit was filed on May 29, 1974.

3. By the issuance of shares and by the agreement to register same, there was no violation of fiduciary obligations by plaintiffs. Plaintiffs had no obligation not to vote on the issuance of shares or on the agreement to register. A quorum was present when the shares and registration agreement were authorized. Proper notice to shareholders of said action was given. Plaintiffs did not defraud and did not deceive defendant. There was no violation by plaintiffs of 16-10-33 UCA, 1953. There was no violation by plaintiffs of the Securities Exchange Commission Act of 1934, 15 U.S.C. Section 78j(b) and Rule 10(b) - 5 promulgated thereunder, 17 C.F.R. 240 10(b) - 5.

4. That plaintiffs were aware or should have been aware of the scope and affect of their agreement with defendant and that either they should have taken steps to enforce the agreement or pursue other means available to render the shares marketable if it was in fact their desire to sell the shares.

5. That plaintiffs failed to carry the burden of proof of their desire to sell the shares.

6. That plaintiffs were aware or are charged with an awareness of their legal rights under the agreement and they effectively waived those rights.

7. That if any damage was sustained, plaintiffs failure to take reasonable action to remove the restrictive legend resulted in a failure in their duty to mitigate damages.

8. That plaintiffs are entitled to judgment against defendant requiring it to exchange the shares for new shares without a restrictive legend thereon.

DATED this 6th day of June, 1975.

BY THE COURT:

/s/ Gordon R. Hall
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing amended Findings of Fact, Conclusions of Law, to Kenneth W. Yeates, Attorney for Defendant, 455 South Third East, Salt Lake City, Utah, 84111, this 6th day of June, 1975.

/s/ John W. Lowe
JOHN W. LOWE

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Plaintiffs and Appellants,

v.

APRIL INDUSTRIES, INC., a Delaware corporation,
Defendant and Respondent.

No. 14143

FILED
March 12, 1976

Allan E. Mecham,
Clerk

GOULD, District Judge:

This case is related to *Lowe v. April Industries, Inc.*, 531 P.2d 1297 (Utah 1974). The plaintiffs here were directors of the former Alta-Helena M & M Corporation which later became April Industries, Inc. The plaintiffs herein and Lowe in the related case were all issued restricted stock in the corporation for services rendered. At the time of the change in ownership of the corporation, the defendant April agreed to register plaintiffs' shares if and when April made a public offering of its shares, which registration would have made plaintiffs' shares marketable. This is known as a "piggyback" registration.

The trial court found that the plaintiffs were the owners of shares validly and legally issued to them as compensation for services rendered, and that plaintiffs' shares were the subject of the "piggy-back" registration agreement which entitled plaintiffs' shares to

registration when April made a public offering of its shares. April later made a public offering but declined to register plaintiffs' shares. The agreement was not honored by April in spite of numerous inquiries and suggestions that it be honored. During the period that plaintiffs were endeavoring to have April honor the registration agreement, the stock offered in the public offering rose in price substantially.

Upon these facts, the trial court held that plaintiffs did not effectively convey to April their desire to sell their shares and should have taken steps to enforce the agreement and denied recovery of damages but ordered April to deliver shares without the restriction theretofore placed on the shares.

We know of no rule of law that either requires or permits this result. Demand is not necessary where both parties have equal knowledge of the contract provision, or where the defaulting party denies the obligation. See 17 Am. Jur. 2d 794, Contracts Sec. 356. Either April performed its contract (which it did not) or April breached its contract (which it did) by failing to register the shares. Plaintiffs were entitled to damages flowing from that breach, subject only to the plaintiffs' obligation to mitigate those damages, if possible. The only possible manner in which damages could have been reduced would have been a sale of the shares through the use of S.E.C. Rule 144. The application of this rule depended upon a favorable opinion by April's legal counsel which was never offered. It is not the responsibility of a party damaged by another's breach to plead with the breaching party to help the damaged party mitigate damages.

The defendant's claim of waiver is adequately controlled by our decision in *Phoenix Ins. Co. v Heath*, 90 Utah 187, 61 P.2d 308. Waiver must be an intentional relinquishment of a known right. The facts here do not support a claim or finding of "intentional

relinquishment" of the rights of the plaintiffs to have their shares registered at the time of the public offering by the defendant.

The decision of the trial court is therefore reversed and the case remanded for the entry of judgment against defendant for damages for breach of contract, which damages would be the difference between the present market value and the highest price obtainable during the period of the breach which we perceive would be the highest price reached during the public offering less sale costs.

WE CONCUR:

F. Henri Henriod, Chief Justice

R. L. Tuckett, Justice

Richard J. Maughan, Justice

ELLETT, Justice, dissents.

CROCKETT, Justice, having disqualified himself, does not participate herein.

APPENDIX C

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH
April 12, 1976

Kenneth Yeates, Esquire
Prince, Yeates, Ward & Geldzahler
Attorneys at Law
455 South Third East
Salt Lake City, Utah 84111

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Plaintiffs and Appellants,

vs. No. 14143

APRIL INDUSTRIES, INC.,
a Delaware corporation,
Defendant and Respondent.

This day petition for rehearing denied; case remitted to Salt Lake County.

Allan E. Mecham, Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX and ARTHUR ANDERSON,
Plaintiffs,

JUDGMENT

vs.

Civil No. 219872

APRIL INDUSTRIES, INC., a Delaware corporation,
Defendant.

This court having on the 28th day of April, 1975, entered judgment herein in which damages were not awarded plaintiffs, and plaintiffs having appealed from said judgment to the Supreme Court of Utah, which court reversed said judgment and ordered the award of damages; and this court having, on the 28th day of April, 1976, entered judgment herein, which, through inadvertence, was signed by Marcellus K. Snow instead of the trial judge and which was therefore, on stipulation of counsel vacated; and the court having considered motions and arguments of counsel relating to the award

of prejudgment interest and having determined that it should be awarded,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. Defendant is ordered to exchange each plaintiff's shares of stock for 1,000 shares of defendant's stock, with no restrictive legend thereon.

2. Each plaintiff is awarded judgment against defendant in the amount of $10,982.50, together with interest in the amount of $2,827.32.

3. Plaintiffs collectively are awarded their costs herein in the amount of $71.40.

DATED this 18th day of May, 1976.

BY THE COURT:

/s/ Gordon R. Hall
JUDGE

CERTIFICATE OF SERVICE

I mailed a copy of the foregoing Judgment, postage prepaid, this 18th day of May, 1976, to Kenneth W. Yeates, attorney for defendant, of Van Cott, Bagley, Cornwall & McCarthy, at 141 East First South, Salt Lake City, Utah 84111.

/s/ John W. Lowe
/s/ John W. Lowe

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD O. BJORK, HERMAN A. BJORK, BEATRICE A. WILCOX, and ARTHUR ANDERSON,
Plaintiffs and Respondents,

vs.

APRIL INDUSTRIES, INC., a Delaware Corporation,
Defendant and Appellant.

No. 14620

FILED
January 24, 1977

Geoffrey J. Butler,
Clerk

ELLETT, Justice:

The appellant was the defendant below in this action. Plaintiffs brought suit for damages alleging defendant's breach of an agreement to register their shares in a public offering of other common shares of defendant's stock. Plaintiffs also sought judgment ordering defendant to issue to plaintiffs new stock certificates without any restrictive legend.

After the trial of this matter in March of 1975 the district court ordered defendant to issue unrestricted certificates but refused to award plaintiffs any damages. From this ruling on damages plaintiffs appealed. On appeal this Court ruled that plaintiffs were entitled to damages for defendant's breach of the registration agreement. On remand the trial court entered judgment (1) requiring defendant to issue new certificates without restrictive legend and (2) awarding damages and accrued interest in the amount of $55,239.28.

In September, 1969, plaintiffs as members of the Board of Directors of Alta Helena Mining and Milling Company, issued to themselves common shares of the company's stock as compensation for past services rendered to the company. The certificates representing ownership of these shares were stamped with a restrictive legend stating that the shares could not be freely sold or transferred. The name of the corporation was changed to April Industries, Inc., and new directors were elected. Plaintiffs also obligated the company to include the shares being issued to them in any future public offering of the company's common stock. This inclusion was to be at no expense to plaintiffs.

In February of 1972 defendant offered its stock for sale to the public. The offering price was $13 per share. None of the shares belonging to plaintiffs was included in this offering. In May, 1974, the plaintiffs began this suit to have the restrictive legend removed from their stock and for damages they sustained by reason of not having their stock included in the public offering.

In the first trial the lower court found the agreement to include plaintiffs' stock in the public offering was valid and enforceable, and that the stock of the plaintiffs had not been included in the public offering. It further held that plaintiffs had waived any and all rights to damages which they may have had. The trial court then gave plaintiffs judgment and ordered defendant to issue to plaintiffs new stock certificates without any restrictive legend.

This Court, in an opinion filed March 12, 1976, reversed the lower court's ruling on plaintiffs' damage claims and remanded the case with instructions to enter a money judgment for plaintiffs.[1]

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1 *Bjork, et al. v. April Industries*, 547 P.2d 219 (Utah 1976).

On May 28, 1976, the trial court entered its second judgment ordering defendant to issue to each of the plaintiffs new certificates without restrictive legend for 1,000 shares of defendant's common stock. In addition, each plaintiff was awarded judgment in the amount of $10,982.50 with interest in the amount of $2,827.32, for a total judgment of $55,239.28.

The damage calculation was as follows: This Court's opinion held the measure of damages to be the highest price during the public offering less the stock's present value.[2] Plaintiffs presented evidence that the highest price during the offering was $12.75. From this number was subtracted a sales commission, typical for transactions in stocks like defendant's of seven percent. The resulting figure was $11.8575 per share. Plaintiffs' evidence also showed that the stock was worth 87-1/2 cents a share on March 12, 1976. By subtracting $.875 from $11.8575 and multiplying by 1,000, the number of shares held by each plaintiff, a damage figure of $10,982.50 was computed. To this figure was added prejudgment interest of $2,827.32, computed at six percent from February 3, 1972, the date of the offering.

The appellant claims two errors in the calculation above: (1) double damages in awarding a money judgment and in removing the restrictive legend; and (2) awarding prejudgment interest.

As to the claim of double damages, there is no merit at all. Had the court awarded the full value of the stock at its highest market value without deducting its present value, then by leaving the stock with the plaintiffs, there would be an improper recovery. However, by finding the value at which the stock would have been sold except for the restriction and deducting its value on the day of the decision of this Court, the resulting figure would be the actual damage sustained by the plaintiffs.

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2 See 547 P.2d 219, 221.

The agreement with the appellant was two-fold: (1) to remove the restrictive legend, and (2) to include plaintiffs' stock in the public offering. The order of the court that the restrictive legend be removed was properly made, but that order by itself would not make the respondents whole for they sustained a huge loss in not being able to sell their stock while the price was high. The respondents are entitled to the damages occasioned by the breach of the agreement to include their stock in the public offering.[3]

The value of the stock on March 12, 1976, as shown by the evidence, was the value of such stock without a restrictive legend on it. It is rather obvious that stock which cannot be sold would have small or no market value. By deducting the value of stock without a restriction of sale from the highest price of the stock would require that the restriction be removed when the stock is kept by, and its value charged to, the respondents. There was no duplication of damages in this case, nor was the judgment inconsistent in its provisions. Defendant cites cases in support of its claim, but those cases are not factually the same as the instant matter.

As to the allowance of interest before judgment, this Court has heretofore spoken, and the law in Utah is clear,[4] viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical

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3 See Note 2, supra.

4 *Jack B. Parson Construction Co. v. State of Utah*, 552 P.2d 107 (Utah 1976); *Uinta Pipeline Corporation v. White Superior Co.*, 546 P.2d 885 (Utah 1976); *Fell v. Union Pacific Railroad Co.*, 32 Utah 101, 88 P. 1003 (1907); McCormick on Damages, Section 55 (Hornbook series).

accuracy, such as in case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.

There is no error and the judgment of the trial court is affirmed. Costs are awarded to the respondents.

WE CONCUR:

_____

Richard J. Maughan, Justice

_____

D. Frank Wilkins, Justice

HENRIOD, Chief Justice, and CROCKETT, Justice, do not participate herein.

Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1463

APRIL INDUSTRIES, INC.,
Petitioner,

vs.

HAROLD O. BJORK; HERMAN A. BJORK; BEATRICE A. WILCOX and ARTHUR ANDERSON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1463

APRIL INDUSTRIES, INC.,
Petitioner,

vs.

HAROLD O. BJORK; HERMAN A. BJORK; BEATRICE A. WILCOX and ARTHUR ANDERSON,
Respondents.

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STATEMENT OF CASE

Respondents do not disagree with petitioner's statement of the case. The statement fails to comply, however, with Rule 23 1(f) requiring that the statement of the case shall set forth:

> ...the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them ...and the way in which they were passed upon by the court; such pertinent quotations...as will show that the federal question was timely and

properly raised so as to give this court jurisdiction...

ARGUMENT

A. Petitioner Did Not Comply With Rule 23

Petitioner's failure to comply with Rule 23 1(f) should result in dismissal of the petition, since petitioner has not shown that any federal question was timely and properly raised in both the court of first instance and the appellate court.

B. There Are No Special Nor Important Reasons For This Review

Rule 19 provides that the writ shall be granted only if there are "special and important reasons therefor," and gives as an example a situation in which the state court has decided a "federal question of substance not theretofor determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." There are no such factors present.

C. There Is No Double Recovery

Petitioner's contention is that there has been a lack of due process because respondents have had a double recovery. Petitioner argues that there was a double recovery because the court ordered petitioner to make restricted shares of stock freely tradeable and also awarded damages for failure of petitioner to have made the shares tradeable while they still had substantial value.

The simple response to such contention is that in computing the award the full value of freely tradeable shares, as of the time of the award of damages, was subtracted from the value of the shares as of the time they could have been sold had petitioner performed its agreement to make respondents' shares tradeable.

Petitioner's "double recovery" contention fails, just as a matter of logic. Had there been no deduction of the value of the shares as of the judgment date, in the computation of damages, petitioner then would have a logical argument. Petitioner elides the deduction of the full value of the shares as of the judgment date by saying that the amount awarded was "virtually equivalent" to the amount respondents would have received had they been able to sell shares at the time of the public offering, as agreed. The only reason the amount awarded was "virtually equivalent" to the price at which they should have been able to sell, was that the shares had dropped in value to "virtually" nothing. At the time of the judgment, the market price had dropped from $12.75 to 87½ cents. Nevertheless, the remaining full value of tradeable shares, 87½ cents, was deducted in the damage computation.

A well established rule in equity is that the court is not limited to the granting of specific performance, but may also award damages if necessary to give complete relief.[1] Petitioner would have this

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1. Northeast Theatre Corporation v. Wetsman, 493 F.2d 314; Annotation 95 A.L.R. 228; Restatement of Contracts, §384; 71 am. Jur.2d, Specific Performance, §216.

court believe that, not only is that an improper rule but also that it even violates the due process clause.

Here respondents were awarded specific performance of the agreement that they should get unrestricted stock and were also awarded damages for having been prevented from selling the stock because it had not been made tradeable. Those awards are not inconsistent.

There is no more double recovery here than there would have been had the stock only declined slightly, and an amount in damages much less than the full value of the shares had been awarded. So long as the actual value of the shares at time of judgment was deducted, whatever it may have been, there is no double recovery.

The double recovery contention was clearly and succinctly treated by the Utah Supreme Court and rejected. The court stated:

> As to the claim of double damages, there is no merit at all. Had the court awarded the full value of the stock at its highest market value without deducting its present value, then by leaving the stock with the plaintiffs, there would be an improper recovery. However, by finding the value at which the stock would have been sold except for the restriction and deducting its value on the day of the decision of this Court, the resulting figure would be the actual damage sustained by the plaintiffs.

The agreement with the appellant was two-fold: (1) to remove the restrictive legend, and (2) to include plaintiffs' stock in the public offering. The order of the court that the restrictive legend be removed was properly made, but that order by itself would not make the respondents whole for they sustained a huge loss in not being able to sell their stock while the price was high. The respondents are entitled to the damages occasioned by the breach of the agreement to include their stock in the public offering.

The value of the stock on March 12, 1976, as shown by the evidence, was the value of such stock without a restrictive legend on it. It is rather obvious that stock which cannot be sold would have small or no market value. By deducting the value of stock without a restriction of sale from the highest price of the stock would require that the restriction be removed when the stock is kept by, and its value charged to, the respondents. There was no duplication of damages in this case, nor was the judgment inconsistent in its provisions.

CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(a) there is no showing that any constitutional question was raised properly in the state proceedings;

(b) there is no "important federal question" involved; and,

(c) there has been no double recovery and thus no violation of the due process clause of the constitution.

Respectfully submitted,

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